UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHKIE LEE,
on behalf of himself, FLSA Collective Plaintiffs, and the Class,

Plaintiff,

v.

GRAND SICHUAN EASTERN (NY) INC.,
AMERICA HOIST INC.,
and ANTONG WANG,

Defendants.

Case No.: 11-cv-8652

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SANCTIONS

I. INTRODUCTION

Plaintiff respectfully submits this Memorandum of Law in support of Plaintiff's motion pursuant to Fed. R. Civ. P. 11, requesting sanctions against Defendants and Defendants' counsel, jointly and severally, for their frivolous filing of Defendants' motion for summary judgment on August 22, 2013. An award of sanctions is appropriate against Defendants and their counsel for the reasons stated herein, namely, having full knowledge that genuine issues of material fact exist, Defendants filed a motion for summary judgment, which serves no purpose other than to delay the resolution of this matter, and needlessly increases Plaintiff's litigation costs.

II. PROCEDURAL BACKGROUND

Plaintiff Johkie Lee filed this lawsuit against Grand Sichuan Eastern (NY) Inc., America Hoist Inc. (together the "Corporate Defendants") and Antong Wang ("Individual Defendant") (Corporate Defendants and Individual Defendant collectively "Defendants") alleging that Defendants (i) failed to pay Covered Employees the proper overtime premium under the FLSA and New York Labor Law ("NYLL"), (ii) failed to pay Covered Employees minimum wages under the FLSA and the NYLL, (iii) failed to pay Covered Employees the spread of hours premium required by the NYLL on workdays lasting longer than ten (10) hours, and (iv) are responsible for statutory penalties under the NYLL for their failure to provide a proper wage statement and wage notice at the beginning of employment and annually thereafter.

On August 22, 2013, Defendants filed a motion for summary judgment alleging that there is no genuine issue to be tried. However, Defendants' summary judgment motion is frivolous and will not succeed based on the existing record and testimony.

During the settlement conference held before Magistrate Judge Frank Maas on October 2, 2013, the Court discussed with the parties, *inter alia*, Defendants' motion for summary judgment. Judge Maas addressed all of the issues contemplated in the motion for summary judgment and stated to Defendants in open court that all such issues are issues of fact, necessitating the denial of summary judgment. Despite the Court advising Defendants' counsel that the motion would surely fail, Defendants refused to withdraw the motion.

Because Defendants' motion for summary judgment is frivolous and serves no purpose other than to delay the litigation and increase Plaintiff's costs, sanctions are appropriate.

III. DISCUSSION

A. RULE 11 SANCTIONS – LEGAL STANDARD

Fed. R. Civ. P. 11(b) provides in relevant part:

By presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the claims, defenses, and other legal contentions therein are warranted by existing law ... [and that] the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Fed. R. Civ. P. 11(b).

If, after notice and a reasonable opportunity to respond, the court determines that the standards set forth in section (b) have been violated, the court may impose sanctions upon the attorneys, law firms, or parties. See Fed. R. Civ. P 11(c), FN 26.

Under Fed. R. Civ. P 11(c), FN 26, the type of sanction to be imposed is within the discretion of the district court. *See Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985); *see also* Rule 11 Advisory Committee Note ("The court ... retains the necessary flexibility to deal appropriately with violations of the Rule. It has discretion to tailor sanctions to the particular facts of the case...."). Among the types of sanctions that the court may choose are: a fine or penalty paid to the court, an award of reasonable expenses and attorneys' fees incurred as a result of the misconduct, an order precluding the introduction of certain evidence, and dismissal of the action. *See* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 259–260 (3d ed.2000); *see also Murray v. Dominick Corp. of Canada, Ltd.*, 117 F.R.D. 512, 515-16 (S.D.N.Y. 1987) (acknowledging that, like Rule 37, Rule 11 provides for the sanction of dismissal of a pleading, motion, or other paper).

A pleading, motion or other paper violates Rule 11 either when it " 'has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well-grounded in fact and warranted by existing law....' " *W.K. Webster & Co. v. American President Lines, Ltd.*, 32 F.3d 665, 670 (2d Cir. 1994) (quoting *Eastway*, 762 F.2d at 254). Sanctions should only be imposed "where it is patently clear that a claim has absolutely no chance of success." *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 626 (2d Cir. 1991) (quoting *Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1005 (2d Cir. 1988) (internal quotation marks and citations omitted)).

In determining whether a Rule 11 violation has occurred, the court should use an objective standard of reasonableness. *See MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253, 1257-58 (2d Cir. 1992). (citing *Business Guides, Inc., v. Chromatic Communications Enters., Inc.* 498 U.S. 533, 548, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)). Whether the attorney's conduct was reasonable should be determined without the benefit of hindsight, based on what was objectively reasonable to believe at the time the pleading, motion or other paper was submitted. *See Kames v. AT & T,* 791 F.2d 1006, 1011-12 (2d Cir. 1986). "Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." *Id.* at 1012.

In the instant action, Plaintiff requests that the Court impose sanctions on the Defendants pursuant to Fed. R. Civ. P. 11, as Defendants failed to conduct reasonable inquiry into the facts and the law before filing their motion for summary judgment. Had they done so, they would have determined that such motion for summary judgment would surely be denied, as the issues upon which summary judgment is sought are genuine issues of fact to be tried. Further, after being explicitly told by Magistrate Judge Maas at the settlement conference held on October 2, 2013 that the summary judgment motion had absolutely no chance of success, Defendants still refused to withdraw the same. When asked by Magistrate Judge Maas whether he agreed that such issues are issue of fact, Defendants' counsel responded "okay".

In Defendants' motion for summary judgment, Defendants allege that, based solely on Defendants' submitted "uncontested facts" (which are in actuality, contested), there is no genuine issue of fact to be tried. Simply put, Defendants have mischaracterized the facts of this case as there are substantial issues of fact that must be determined by the jury, specifically as to whether Plaintiff was paid the proper minimum wage, overtime premium and spread of hours premium; whether Plaintiff received the required wage statements and wage notice and what hours did Plaintiff work[1]. In the settlement conference before Judge Maas on October 2, 2013, the Court explained to Defendants' counsel that testimony or a declaration from the plaintiff or any other witness as to the issues raised creates an issue of fact necessitating the denial of summary judgment. Specifically, Judge Maas stated that Defendants can't get summary judgment if a witness [the Plaintiff] says the hours he worked are different from those listed in the schedules provided by Defendants. Judge Maas further stated that the tip credit issue is an issue of fact that a jury should decide.

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[1] The issue of whether Grand Sichuan Eastern (NY) Inc. was Plaintiff's employer is moot as Plaintiff has informed the Court it will voluntarily dismiss said corporation as a Defendant in this action.

As stated in further detail in Plaintiff's Memorandum of Law in Opposition to the Defendants' motion for summary judgment, which arguments are fully incorporated herein, Plaintiff disputes Defendants' allegations that Antong Wang was not Plaintiff's employer, the hours Defendants allege Plaintiff to have worked and whether Plaintiff was paid the proper minimum wage, overtime premium, spread of hours premium or received the proper notices, which, at the least, are issues outstanding as issue of fact and inappropriate for summary judgment determination. Not only must Defendants' motion for summary judgment must be denied, but sanctions must be assessed.

As the Court is fully aware, Fed. R. Civ. P. 56 (c) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." The burden is on the moving party to demonstrate that there is no genuine dispute respecting any material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In view of the foregoing, the issues of whether a defendant is an employer, whether Plaintiff was paid the proper minimum wage and overtime premium, and whether Defendants' pay practices were in compliance with the Fair Labor Standards Act ("FLSA") are clearly triable issues of fact, not appropriate for summary judgment. Therefore, Defendants' motion for summary judgment serves no purpose other than to delay this litigation and resolution of this matter, and to needlessly increase the costs of litigating this action for the Plaintiff.

B. DEFENDANTS WERE AFFORDED SAFE HARBOR NOTICE

A party moving for Rule 11 sanctions must do so in a filing "made separately from any other motion." Fed R. Civ. P. 11 (c)(2). Plaintiff is in compliance with such condition precedent in filing the instant motion. Section 11(c)(2) provides a "safe harbor" in that the motion must not only specify the defect for which sanctions are sought but must not be filed until the alleged violator is afforded twenty-one days to withdraw or correct the offending document. *See Id.*; *see also In re Pennie & Edmonds LLP*, 323 F.3d 86, 89 (2d Cir. 2003) (observing that "safe harbor" provision "functions as a practical time limit, and motions have been disallowed as untimely when filed after a point in the litigation when the lawyer sought to be sanctioned lacked an opportunity to correct or withdraw the challenged submission").

In the instant action, the record is clear that Plaintiff provided Defendants with both notice (exceeding the required 21 days notice) and the opportunity to avoid the instant motion for sanctions, had they withdraw their frivolous motion for summary judgment. Plaintiff complained expressly and repeatedly that there was no basis for Defendant's motion for summary judgment, as the very issues upon which summary judgment is sought are itself, triable issues of fact. Magistrate Judge Maas also specifically informed Defendants at the conference that Defendant's summary judgment motion had no chance of success. As explained above and in the Affirmation of Anne Seelig, Esq. annexed hereto, Plaintiff has already put the Court, and the Defendants on notice regarding the filing of the motion for sanctions, by email to Defendants' counsel dated October 2, 2013, by joint letter to the Court dated October 9, 2013 (ECF Dkt. No. 47), and by serving the instant motion for sanctions at least 21 days before filing the same with the Court, pursuant to the safe harbor rule (See Exhibit B to the Affirmation of Anne Seelig, Certificate of Service).

Further, during the Court conference on October 2, 2013 Judge Maas specifically informed Defendants their summary judgment motion would be denied. Therefore, the record is clear that Defendants received the notice required by the Rule. Defendants had the opportunity to withdraw their motion for summary judgment, or to defend themselves from the instant application for sanctions.

C. JOINT AND SEVERAL LIABILITY OF DEFENDANTS AND DEFENDANTS' COUNSEL

Pursuant to Fed. R. Civ. P. 11, both Defendants and Defendants' Counsel should be jointly and severally sanctioned for the aforementioned conduct. Specifically, both the party (Defendants) and Defendants' counsel, having signed the motion for summary judgment and the two (2) supporting affidavits annexed thereto, are liable for the attorney's fees incurred by Plaintiff as a result of Defendants' filing of the frivolous motion for summary judgment.

As to the allocation of liability on a motion for sanctions, the Supreme Court has made it clear that Rule 11 sanctions are specifically tied to a particular document and directed toward the individual who signed that document. *See Business Guides,* 498 U.S. at 551-54; *Pavelic v. LeFlore,* 493 U.S. at 124-25. Thus, "the essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit." *Business Guides*, 498 U.S. at 546.

In the instant action, the motion for summary judgment and supporting papers were signed by individual Defendant Antong Wang, Wen Yan Gao (the principal of Corporate Defendant America Hoist Inc.), and Defendants' counsel, Song Chen, Esq. Specifically, in support of the motion for summary judgment, the following supporting documents are submitted (i) Certification of Antong Wang and (ii) Certification of Wen Yan Gao.

In view of the foregoing, both the party (Defendants) and their counsel should be held jointly and severally liable for the sanctions imposed for the frivolous filing of the motion for partial summary judgment.

IV. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Plaintiff requests sanctions be issued in favor of Plaintiff, against Defendants and Defendants' counsel, jointly and severally. Once the Court determines that sanctions are appropriate, Plaintiff's counsel will submit a fee application for the amount of legal fees incurred in opposing the summary judgment motion and preparing the Rule 11 motion.

Respectfully submitted,

Dated: October 11, 2013
New York, New York

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